

**State of California**  
**Department of Industrial Relations**  
**M e m o r a n d u m**

**To:** Chairman MacLeod and Members of the Standards Board

**Date:** June 8, 2012

**From:** Marley Hart, Executive Officer  
Occupational Safety and Health Standards Board

**Subject:** **Decision Regarding Petition 526**

Petition 526 has generated a great deal of polarized comment. At the May 17, 2012 Board meeting, the Board voted four to two to reject the Board staff's recommendation to send the matter to a Division-of-Occupational-Safety-and-Health-convened advisory committee. The Board's discussion made clear that this vote was not necessarily the final word on Petition 526, and even in the absence of such discussion, there is no provision of the law that precludes Board staff from bringing matters back to the Board for further consideration. The Board staff has done so in the past and did so recently regarding the mechanical ventilation rulemaking.

Because this matter has generated an unusual amount of controversy and because there is no indication as to the three new Board members' thoughts regarding this matter, the Board staff has taken the unusual course of providing four alternative versions of a possible proposed decision. The objective is to give the Board a spectrum of choice. Of course, the Board is not limited to these four options, and at the Board meeting, Board members might direct an outcome totally different from the options presented.

As it did on May 17, the Board staff continues to believe that sending this matter to an advisory committee is appropriate. Three of the options make such a referral, but do so somewhat differently, and the fourth option takes a very different tact:

- Version 1 presents the Decision and Order that was rejected at the May 17 meeting. Its wording is the wording normally used when a matter is referred to a Division-convened advisory committee.
- Version 2 presents a Decision and Order that was intended to address the concerns of the Board members who voted against the recommendation considered on May 17. Version 2 was drafted and circulated before the new appointments to the Board were made.
- Version 3 also is intended to address concerns raised by the Board on May 17; it was derived from wording suggested by the Division.
- Version 4 embodies the result urged by many persons who spoke on May 17 in opposition to the Board staff recommendation.

The portion of each version that differs from the other versions has been highlighted.

For the Board's reference, the statute governing petitions, Labor Code Section 142.2, reads as follows:

At each of its meetings, the board shall make time available to interested persons to propose new or revised orders or standards appropriate for adoption pursuant to this chapter or other items concerning occupational safety and health. The board shall consider such proposed orders or standards and report its decision no later than six months following receipt of such proposals.

Nothing in that statute prescribes detailed procedures for the manner in which the Board considers petitions, and nothing precludes the Board from reconsidering the action taken on May 17, 2012 regarding Petition 526.

The controversy as to whether to send this matter to an advisory committee has been so intense as to indicate that some members of the public might not understand the advisory committee process fully. An advisory committee advises; it does not make a final decision regarding a rulemaking. Rulemaking proposals often go forward without advisory committees, and not all advisory committee recommendations result in the adoption of occupational safety and health standards.

If an advisory committee produces a rulemaking recommendation, the full rulemaking process required by the Administrative Procedure Act, the Labor Code and Board practice still must take place. That process includes, among other things, public notice, a public comment period that lasts several weeks, a public hearing and a vote by the Board.

The Board staff believes that this matter is ready for the Board's further consideration.